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In The

Supreme Court of the United States

78

JEFFREY KITTKA,

Petitioner,

v.

MICHIGAN,

Respondent.

On Petition For Writ Of Certiorari To The Michigan Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Sixth Amendment permits the upper limit of a Michigan offender's sentencing guidelines range to be increased beyond the intermediate sanction threshold based on facts which have not been proved to a jury beyond a reasonable doubt.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jeffrey Kittka respectfully petitions for a writ of certiorari to the Michigan Court of Appeals in *People* v. *Kittka*, No. 269425.

OPINIONS BELOW

The Michigan Court of Appeals' opinion (Pet. App. 1a-6a) affirming Petitioner's sentence is unpublished, but electronically reported at 2007 WL 1490471. The Michigan Supreme Court's summary order (Pet. App. 12a-13a) denying Petitioner's application for leave to appeal is reported at 738 N.W. 2d 741 (Mich. 2007).

JURISDICTION

The order of the Michigan Supreme Court denying discretionary review was entered on September 24, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Mich. Comp. Laws §769.34 (West 2006) is reproduced in the appendix to this petition. Pet. App. 14a-19a.

STATEMENT OF THE CASE

1. On January 31, 2005, while her mother was putting her to bed, seven-year-old M.M. complained that Petitioner had inappropriately touched her. M.M.'s mother is the sister of Petitioner's wife, Debra Kittka. Prior to the complaint, M.M. and her younger sister often spent the night with Petitioner and Mrs. Kittka at their Novi, Michigan residence. Following M.M.'s allegation, her mother initiated a criminal investigation by contacting the Novi Police Department. Mark Boody, a juvenile detective, was assigned to handle the investigation. Consistent with department protocol, Det. Boody arranged for M.M. to be interviewed at Care House in Pontiac, Michigan. Staff members at Care House are trained to speak

with juvenile victims in a neutral and non-leading fashion. Care House interviews are not recorded. M.M.'s interviewer asked whether anything had happened to her. Although M.M. initially said no, she later pointed to her vaginal area and indicated that Petitioner touched her there.

After M.M.'s interview, Det. Boody went to Petitioner's place of employment. He waited for approximately fifteen minutes while Petitioner finished up in a meeting. When Petitioner came out to the lobby area, Boody indicated that he wanted to conduct an interview in connection with the allegations of improper touching. Petitioner agreed, and followed Boody to the Novi Police Department. When they arrived, Petitioner's wife was waiting in the lobby. Det. Boody conducted a recorded interview of Petitioner in a room on the second floor of the police department. Mrs. Kittka waited outside.

Det. Boody informed Petitioner that he did a thorough background check, and had received positive feedback:

> Now, Jeff, I don't see one bit of criminal history on you at all. . . . You have a great family, you have a great job. . . . And so I know that you are an outstanding person. I found out how you help out, you're a – your brother-in-laws around the house, you're pretty, a pretty handy man as far as fixing things, and, um, and, and I understand that, and so, looking at that, see, I, I know that

> I'm not dealing with somebody who likes to go out and hurt kids. I know that.

Jury Trial, Jan. 30, 2006, Tr. pg. 211. He explained that he was investigating allegations that Petitioner fondled both M.M. and another niece. Although Petitioner initially denied having knowledge about any improper touching, he noted that his nieces frequently spent the night, particularly when they were not in school. They sometimes slept on an air mattress in a finished area of the basement while Petitioner slept on a nearby couch.

During the interview, Petitioner recalled one instance in which M.M. wanted to sleep downstairs near the fireplace. M.M. wanted him to sleep down there with her because she did not want to be alone. Petitioner slept near her on the floor for awhile, and then moved to the couch for the rest of the night. Det. Boody informed Petitioner that M.M. was accusing him of putting his hand inside her pajama bottoms, and then inside her underwear. Petitioner conceded that he did not think M.M. would lie about such serious allegations. He speculated that he could have unconsciously touched M.M. under the mistaken impression that his wife was sleeping next to him.

2. Petitioner was later charged with committing multiple counts of criminal sexual conduct. On February 28, 2005, he was arraigned in the 52nd District Court, First Division, and released on bond. After retaining counsel, Petitioner returned to court and waived his preliminary examination. He was bound

over to the Oakland County Circuit Court to stand trial on two counts of criminal sexual conduct in the second degree. Each count alleged that Petitioner engaged "in sexual contact with another person, to wit: [M.M.], said person being under 13 years of age." General Information, pp. 1-2.

At trial, M.M. testified that the last time she slept in the basement at Petitioner's residence, he "put his hands somewhere he shouldn't have." Jury Trial, Jan. 30, 2006, Tr. pg. 115. She said that Petitioner reached under her pajamas and underpants, used his fingers to touch her where she "pee[s]," and moved his fingers "[k]ind of everywhere." *Id.*, Tr. pp. 115-116. She testified that Petitioner stopped touching her when she pushed his hand away. *Id.*, Tr. pg. 117. The prosecutor asked M.M. what Petitioner did after she pushed his hand away, to which she responded, "[S]ome nights he moved and some nights he just stayed." *Id.*, Tr. pg. 118. M.M. could not recall precisely how many times Petitioner allegedly touched her, but answered affirmatively when asked whether there were at least two instances. *Id.*, Tr. pg. 121. She was able to remember a second instance during which Petitioner purportedly touched her "private" with "his hand." *Id.*, Tr. pp. 121-122. The second instance was about one week before the last time she spent the night at Petitioner's house. *Id.*, Tr. pg. 137.

The prosecutor also called Det. Boody and M.M.'s mother. Boody outlined his investigation, and played the video recording of Petitioner's interview at the

police department. M.M.'s mother recalled that M.M. visited Petitioner's residence approximately six times per year, and spent the night about two thirds of the time. Jury Trial, Jan. 30, 2006, Tr. pg. 152. On January 31, 2005, M.M. told her about four or five instances of improper touching. *Id.*, Tr. pp. 155, 178. She said M.M.'s behavior has changed since the last incident: "[M.M.] has gotten very down on herself, very low self-esteem. . . . I notice she'll get upset and then she'll go and she'll start eating, and – she's having nightmares and she's fearful of a lot of things." *Id.*, Tr. pg. 162.

The defense called three witnesses. Mrs. Kittka testified that Petitioner has an "[e]xceptionally high" reputation in the community for truth and honesty. Jury Trial, Jan. 31, 2006, Tr. pg. 282. She explained that Petitioner would rather have slept upstairs on the night of January 14, 2005, but that M.M. wanted to sleep in the basement. *Id.*, Tr. pg. 292. Attorney Theodore Tekesian, a character witness, testified that he had known Petitioner for approximately five years. *Id.*, Tr. pg. 318. Tekesian, whose son is friends with Petitioner's son, knew him because they were each Cub Scout leaders. *Ibid.* He opined that Petitioner "has a very good reputation for truth and honesty," and pointed out that he was a "very trusted member" of the Cub Scout pack. *Id.*, Tr. pp. 319-320. Donna Holtschneider, a friend of Petitioner's wife, testified that she had known him for approximately twenty years. *Id.*, Tr. pg. 326. She believed Petitioner has "a

reputation for being honest and true," and an "exemplary" moral character. *Id.*, Tr. pp. 327-328.

The jury found Petitioner guilty of the first count of second-degree criminal sexual conduct, but acquitted him of the second count. Pet. App. 7a; Jury Trial, Feb. 1, 2006, Tr. pg. 412. Prior to sentencing, the prosecutor filed a memorandum requesting that Petitioner be assessed 25 offense variable ("OV") points under OV-13 for engaging in a pattern of felonious activity involving three or more crimes against a person. Sentencing Memorandum, pg. 6. The prosecutor maintained that "even though the jury in the instant case may have acquitted the Defendant on the second count, [the] court may still use the second count and the testimony of the victim to find that . . . three or more crimes against a person [were committed]." *Id.*, at pp. 6-7. The prosecutor also argued that Petitioner should receive 10 OV points because the offense resulted in psychological injury to M.M., and an additional 10 OV points for exploiting a vulnerable victim. *Id.*, at pp. 4-6. He calculated Petitioner's sentencing guidelines range as follows:

> Given his PRV [prior record variable] and OV totals, the Defendant is an A-IV. Second Degree Criminal Sexual Conduct has a maximum sentence of fifteen years, scored on the C grid. The Defendant's minimum guideline range, as an A-IV, is 12 to 24.

Id., at pg. 7. The 25-point increase for engaging in a pattern of felonious activity moved Petitioner from an A-II cell requiring an intermediate sanction of no

more than 12 months in a county jail, to an A-IV straddle cell authorizing either an intermediate sanction or a prison sentence. The trial court ultimately adopted the guidelines range set forth in the prosecutor's memorandum, and sentenced Petitioner to a term of 18 months to 15 years imprisonment. Pet. App. 8a-10a.

3. With the assistance of appointed counsel, Petitioner appealed as of right to the Michigan Court of Appeals. Petitioner's attorney filed a combined motion to remand and brief on appeal. The motion asserted that the case should be remanded for resentencing because, under the correct scoring of OV-13, Petitioner should have received an intermediate sanction. Motion to Remand, Sep. 25, 2006, pg. 2. Relying on this Court's reasoning in *Blakely* v. *Washington*, 542 U.S. 296 (2004), the brief disputed the scoring of 25 points under OV-13. The brief asserted that "it is improper to be scored points for conduct [the] jury expressly found [Petitioner] not guilty of." Brief on Appeal, pg. 15.[1] On October 27, 2006, the Michigan Court of Appeals entered an order denying the motion for a remand. Pet. App. 11a. The motion was denied because Petitioner "failed to demonstrate that the issue should be decided initially by the trial court." *Ibid.* On May 22, 2007, the court issued an unpublished opinion affirming Petitioner's conviction

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[1] The brief also contained a state law challenge to the trial court's failure to instruct the jury regarding the defense of accident.

and sentence. *Id.*, at 1a-6a. The court acknowledged Petitioner's argument that "the trial court was not entitled to assess points on the basis of its own conclusion that [Petitioner] committed more acts of CSC than what the jury determined beyond a reasonable doubt." *Id.*, at 3a. But the court concluded that the Michigan system is "unaffected" by the holding in *Blakely*. Pet. App. 4a (citing *People* v. *Drohan*, 715 N.W. 2d 778 (Mich. 2006)).

Petitioner retained new counsel and filed an application for leave to appeal in the Michigan Supreme Court. The application asserted that the trial court imposed sentence in a manner contrary to the Sixth Amendment when it increased Petitioner's applicable statutory maximum from twelve months to fifteen years based on facts which were not proved to the jury beyond a reasonable doubt. Because Petitioner had served in excess of 12 months at the time of the application, he moved for immediate consideration. On September 24, 2007, the Michigan Supreme Court entered an order granting the motion for immediate consideration, but denying the application. Pet. App. 12a-13a.

REASONS FOR GRANTING THE WRIT

Petitioner was charged under Mich. Comp. Laws §750.520c(1)(a) (West 2006) with committing two counts of criminal sexual conduct in the second degree. A jury convicted him of one count, and acquitted him of the

other. Michigan's intermediate sanction provision precludes courts from sentencing eligible offenders to more than a flat 12-month term of imprisonment. Mich. Comp. Laws §769.34(4)(a). Based solely on facts found beyond a reasonable doubt by the jury, Petitioner's score under the Michigan sentencing guidelines entitled him to an intermediate sanction. Despite the jury's decision to acquit him of one of two counts, the trial court concluded that Petitioner's offense was part of a pattern of felonious activity involving multiple crimes against a person. That finding pushed Petitioner's sentencing guidelines score past the intermediate sanction threshold, and permitted the trial court to significantly increase the length of his term of imprisonment. On appeal, the Michigan Court of Appeals determined that the trial court's additional fact-finding was not inconsistent with Petitioner's Sixth Amendment right to trial by jury, and the Michigan Supreme Court denied discretionary review. Certiorari should be granted because the judicial fact-finding sanctioned by the Michigan Court of Appeals violates the Sixth Amendment in the same manner as the fact-finding in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and its progeny.

I. THERE IS NO ADEQUATE STATE GROUND BARRING REVIEW OF THE JUDGMENT BELOW.

The Michigan Court of Appeals considered whether Petitioner's sentence violated the Sixth Amendment, but it did so only after suggesting that

his failure to preserve the sentencing issue in the trial court was "fatal to it." Pet. App. 3a. The court maintained that Petitioner's motion to remand did not preserve his sentencing issue for appeal because the motion was untimely. *Ibid.* When a state court decision "indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds," certiorari review of the decision is generally unwarranted. *Michigan* v. *Long*, 463 U.S. 1032, 1041 (1983). It is incumbent upon this Court, however, to "ascertain for itself" whether the asserted non-federal ground adequately supports the judgment. *Id.*, at 1038 (citing *Abie State Bank* v. *Bryan*, 282 U.S. 765, 773 (1931)).

Under Mich. Comp. Laws §769.34(10), certain sentencing claims must be raised in the lower court before being presented on appeal:

> A party shall not raise on appeal an issue challenging the scoring of the sentencing guidelines or challenging the accuracy of information relied upon in determining a sentence that is within the appropriate guidelines sentence range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals.

Pet. App. 18a. At Petitioner's sentencing proceeding, rather than challenging the prosecutor's interpretation of the proper guidelines score, trial counsel stated, "Judge, first of all, I believe that the guidelines now are 12 to 24 months." Sentencing, Mar. 2,

2006, Tr. pg. 7. While the case was pending in the Michigan Court of Appeals, appointed counsel recognized that the jury's verdict only authorized an intermediate sanction, and accordingly filed a motion to remand for re-sentencing. Admittedly, the motion was not filed in a timely manner. However, the timeliness requirement is not jurisdictional. See Mich. Ct. App. Internal Operating Procedure 7.211(C)(1) (available at http://www.courtofappeals.mijud.net/pdf/clerkiops.pdf) (granting of a motion to remand "whether timely or not" will stay further appellate proceedings). Here, the court did not enforce the timeliness requirement in connection with its denial of the motion to remand. Instead, the denial was based on Petitioner's failure to "demonstrate that the issue should be decided initially by the trial court." Pet. App. 11a. Nevertheless, based on timing considerations, the panel which issued the opinion affirming his conviction and sentence determined that Petitioner's post-sentencing motion did not preserve his sentencing challenge. Pet. App. 3a.

In *Hathorn* v. *Lovorn*, 457 U.S. 255 (1982), this Court made it clear that a state procedural rule which is not strictly or regularly applied may not be invoked in an attempt to insulate a lower court judgment from certiorari review. The Court was asked to review an issue which was raised for the first time in a petition for rehearing before the Mississippi Supreme Court. The Court swept aside the assertion that the judgment below was decided on an adequate and independent state ground: "Even if we

construe the Mississippi Supreme Court's denial of petitioners' petition for rehearing as the silent application of a procedural bar, we cannot conclude that the state court consistently relies upon this rule." *Id.*, at 263. Like the Mississippi Supreme Court in *Hathorn*, the Michigan Court of Appeals in the instant case did not premise the denial of Petitioner's motion to remand upon the violation of a state procedural rule. The court's determination that Petitioner failed to demonstrate the need for the trial court to decide the sentencing issue in the first instance was a denial on the merits. And the fact that the court's own internal operating procedures indicate that even an untimely motion to remand may be granted illustrates that the procedural rule cited by Petitioner's merits panel is not consistently enforced.

Further, Michigan law provides that a constitutional claim affecting a substantial right is reviewed for plain error, even if the claim was not preserved below. See *People* v. *Carines*, 597 N.W. 2d 130 (Mich. 1999). In a published opinion filed less than two months before the opinion in the instant case, the Michigan Court of Appeals vacated the defendant's sentence based on Sixth Amendment error, despite the fact that the claim was not preserved in the trial court. *People* v. *Uphaus*, 737 N.W. 2d 519 (Mich. Ct. App. 2007). Applying the plain error standard set forth in *Carines*, the court determined that the defendant's prison sentence violated *Blakely* because, absent judicial fact-finding, he would have been entitled to an intermediate sanction. The panel which

decided Petitioner's case cited *Uphaus* in the body of the unpublished opinion, but refused to review his own Sixth Amendment challenge for plain error. Pet. App. 5a. The panel attempted to reconcile the tension between the two decisions by deeming Petitioner's challenge a claim of "scoring error" rather than constitutional error. However, so long as it falls outside the appropriate guidelines sentence range, even an unpreserved scoring error is reviewed under the plain error standard. *People* v. *Kimble*, 684 N.W. 2d 669, 672 (Mich. 2004). Since Petitioner's claim (even if it could be construed as a scoring issue rather than a constitutional issue) is grounded in the assertion that his prison sentence was not permitted under the appropriate guidelines range, cf. *People* v. *Stauffer*, 640 N.W. 2d 869 (Mich. 2002), the claim should have been reviewed for plain error.[2]

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[2] Although Petitioner's panel did not expressly invoke the waiver doctrine, it noted that at the time of the sentencing proceeding the parties agreed that Petitioner's guidelines range was 12 to 24 months. Trial counsel's statement that he believed the proper range to be 12 to 24 months did not result in the waiver of Petitioner's constitutional challenge on appeal. Nothing in the record suggests that Petitioner knowingly waived his Sixth Amendment right to be sentenced based on facts determined beyond a reasonable doubt by a jury. Moreover, in a case decided eighteen days before the opinion in the instant case was entered, the Michigan Supreme Court vacated a defendant's sentence based on a scoring error even though trial counsel stipulated to the improper scoring of an offense variable. *People* v. *Greene*, 730 N.W. 2d 478 (Mich. 2007).

The respondent in *Barr* v. *City of Columbia*, 378 U.S. 146 (1963), argued that the petitioners' convictions for criminal trespass and breach of the peace could not be considered by this Court because the Supreme Court of South Carolina rejected their constitutional claims as being "too general." *Id.*, at 149. However, only a few weeks after the Supreme Court of South Carolina decided the case in question, it reversed a different individual's conviction on the basis of the same general claims. Accordingly, this Court rejected the City of Columbia's contention that the judgment below had been decided on an adequate state ground. In the instant case, instead of reviewing Petitioner's constitutional claim for plain error, the Michigan Court of Appeals decided that trial counsel's failure to raise the issue was a fatal defect. Because the Michigan Court of Appeals affords plain error review to other litigants presenting claims of unpreserved constitutional error, its refusal to do the same in Petitioner's case is no more an adequate state ground than the defect cited by the Supreme Court of South Carolina in *Barr*.

II. A JUDGE MAY ONLY ESCHEW THE INTERMEDIATE SANCTION REQUIREMENT ON THE BASIS OF FACTS PROVED TO A JURY BEYOND A REASONABLE DOUBT.

Absolute maximum prison sentences for felonies committed in the State of Michigan are governed by statute. But judges do not have complete discretion to sentence within those maximums. The sentencing

guidelines limit a trial judge's power to incarcerate an offender in two respects. First, in cases in which the upper limit of an offender's guidelines range exceeds 18 months, a trial court may imprison the offender by imposing a minimum and maximum sentence. The minimum, which must be within the applicable sentencing guidelines range, represents the shortest term the offender must serve prior to becoming parole eligible. The maximum, which must correspond with the absolute maximum as set forth by statute, represents the longest term the offender may be required to serve prior to release.

For less serious offenders, the sentencing guidelines limit a judge's discretion in yet another respect. Mich. Comp. Laws §769.34(4)(a) requires that, when the upper limit of an offender's guidelines range is 18 months or less, the offender be sentenced to an intermediate sanction. "An intermediate sanction may include a jail term that does not exceed . . . 12 months." *Id.* The intermediate sanction provision's use of the word "shall" leaves no room for the conclusion that its application is discretionary in nature. See *id.* To the contrary, once it has been determined that an offender is eligible for an intermediate sanction, any sentence of incarceration beyond a fixed 12-month term will be reversed. See, *e.g.*, *People* v. *Alspaugh*, 739 N.W. 2d 874 (Mich. 2007).

There are two manners in which a trial court may circumvent the intermediate sanction requirement in favor of sending an offender to prison. First, a judge may state on the record "a substantial and

compelling reason" to deviate from the sentencing guidelines in order to impose a prison term. Mich. Comp. Laws §769.34(4)(a). The Michigan Supreme Court has determined that a substantial and compelling reason cited in favor of a guidelines departure need not be supported by proof beyond a reasonable doubt, even if the departure deprives an otherwise eligible offender of an intermediate sanction. *People* v. *Harper*, 739 N.W. 2d 523 (Mich. 2007). The second manner in which a judge may deny an intermediate sanction to an offender whose sentencing guidelines range does not exceed 18 months is to employ judicial fact-finding in order to increase the upper limit of the offender's guidelines range. It is this second approach which is at issue in the instant case. In *People* v. *McCuller*, 739 N.W. 2d 563 (Mich. 2007) (after remand), the Michigan Supreme Court held that judicial fact-finding employed in a manner which increases an individual's guidelines range beyond the intermediate sanction threshold is not inconsistent with the Sixth Amendment right to trial by jury.

The principle that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt,"[3] is not in serious dispute in this case. But the parties are in disagreement over whether Michigan's intermediate sanction provision prescribes a statutory maximum. Petitioner contends

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[3] *Apprendi*, 530 U.S., at 490.

that the scoring of his sentencing guidelines range, based on facts determined by the jury at his trial, resulted in the upper limit of his guidelines range being no more than 17 months. Because a 17-month upper limit requires an intermediate sanction, Petitioner's prescribed statutory maximum is 12 months. Respondent maintains that the absolute maximum sentence of 15 years for criminal sexual conduct in the second degree is the prescribed statutory maximum which governs this case.

The petitioner in *Blakely* pled guilty to second-degree kidnaping, which carried an absolute maximum sentence of 10 years. 542 U.S., at 299. Under Washington law, however, absent "substantial and compelling reasons justifying an exceptional sentence," the most serious sentence he could receive was a standard term of 53 months. *Ibid.* He appealed after the trial judge imposed a term of 90 months. Similar to the sentence in the instant case, the trial judge's sentence was within the 10-year absolute maximum, but well in excess of the 53-month standard term. This Court concluded that the relevant statutory maximum for *Apprendi* purposes was "not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." *Id.*, 542 U.S., at 303-304 (emphasis in original). Since the trial court was required to engage in judicial fact-finding in order to exceed the 53-month standard term, the 90-month sentence violated the Sixth Amendment.

On the other hand, this Court has held that, subject to limitations, a court does not violate the jury trial guarantee by imposing a mandatory minimum term of imprisonment on the basis of facts found by the judge rather than the jury. In *McMillan* v. *Pennsylvania*, the Court concluded that the Sixth Amendment does not preclude the imposition of a mandatory minimum term based on a judge's determination that an individual engaged in specified offense conduct, so long as the statute calling for the minimum term "limit[s] the sentencing court's discretion in selecting a penalty within the range already available to it" without additional fact-finding. 477 U.S. 79, 88 (1986). Straight-forward application of *McMillan* to Michigan's sentencing system poses no great difficulty with offenders who are *not* entitled to an intermediate sanction. Assuming that a parole eligibility date constitutes a minimum rather than a maximum term, *McMillan* arguably appears to authorize the use of judicial fact-finding in order to increase the length of time an offender must serve before becoming eligible for early release.

A Michigan offender who is entitled to an intermediate sanction, however, is analytically distinct from one who is not. When the upper limit of an individual's sentencing guidelines range is 18 months or less, the trial court may impose no more than 12 months in a county jail. A trial judge who departs from the 12-month intermediate sanction ceiling by instead sending an offender to prison for a variable term with a 12-month floor is creating a new maximum, not

selecting a penalty within the already available range. Hence, insofar as the Sixth Amendment is concerned, the intermediate sanction threshold in the instant case is more akin to the 53-month limitation in *Blakely* than the 5-year mandatory minimum in *McMillan*.

III. THE TRIAL COURT IMPOSED SENTENCE IN VIOLATION OF THE SIXTH AMENDMENT.

The jury found Petitioner guilty of the first count of second-degree criminal sexual conduct, and not guilty of the second.[4] Pet. App. 7a. Second-degree criminal sexual conduct is a class C crime against a person. Mich. Comp. Laws §777.16y (West 2006). The grid for class C offenses contains four intermediate sanction cells: A-I, A-II, B-I, and B-II. Mich. Comp. Laws §777.64 (West 2006). With no prior criminal history, Petitioner received zero PRV points. As a result, he was scored in column A of the class C grid. An OV score of 24 points or less would have left Petitioner in the A-I or A-II cell, either of which would mandate an intermediate sanction. The prosecutor first asserted that Petitioner should receive 10 points under OV-4 because M.M. incurred psychological injury, and 10 points under OV-10 for exploiting a

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[4] The judgment of sentence inaccurately states that he was acquitted of the first count and convicted of the second. Pet. App. 9a.

vulnerable victim. See Mich. Comp. Laws §§777.34, 777.40 (West 2006). Twenty cumulative points under OV-4 and OV-10 moved Petitioner into the A-II intermediate sanction cell. Mich. Comp. Laws §777.64.

In order to bump Petitioner into a straddle cell, the prosecutor contended that he should receive 25 points under OV-13 because the offense was part of a pattern of felonious criminal activity involving three or more crimes against a person. See Mich. Comp. Laws §777.43 (West 2006). The prosecutor argued that "even though the jury in the instant case may have acquitted the Defendant on the second count, [the] court may still use the second count and the testimony of the victim to find that . . . three or more crimes against a person [were committed]." Sentencing Memorandum, pp. 6-7. The trial court adopted the prosecutor's recommendation, assessed 25 points under OV-13, and determined that Petitioner's total score placed him in the A-IV cell. Consequently, the trial court concluded that it had the discretion to choose a term of imprisonment instead of an intermediate sanction. See Mich. Comp. Laws §769.34(4)(c)(*i*).

Offenders who fall within an intermediate sanction cell are assured of a maximum sentence of no more than 12 months behind bars. Those who are sent to prison face an uncertain future. Petitioner, for example, became eligible for parole after serving his 18-month minimum. But unless the Michigan Parole Board chooses to grant him parole at some point, Petitioner could serve up to 15 years prior to his release. Given the potentially monumental level of

disparity between a jail sentence and a prison sentence, when a trial court endeavors to thrust an offender past the intermediate sanction threshold, the right to trial by jury should require that the facts justifying the increase either be admitted by the offender or proved to a jury beyond a reasonable doubt.

Had the number of crimes Petitioner committed been determined by applying the jury's verdict, he would have been entitled under Mich. Comp. Laws §769.34(4)(a) to receive no more than one year in a county jail. The conclusion that only one crime was committed would neither support the 25-point increase under OV-13, nor the increase of the upper limit of Petitioner's guidelines range beyond 18 months. The trial court's determination that he committed three or more crimes against a person, when he was charged with only two crimes and convicted of only one, subjugated the role of the individuals chosen to decide Petitioner's fate. As this Court noted in *Blakely*, "[t]he jury could not function as circuitbreaker in the State's machinery of justice if it were relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish." *Id.*, 542 U.S., at 306-307 (emphasis in original). The Sixth Amendment ensures that the trial judge's opinion about an individual's guilt is ancillary to the opinion of the jury, not vice versa.

The jury's verdict alone entitled Petitioner to an intermediate sanction. Imprisonment for up to 15 years became cognizable only after the trial court made its own finding that Petitioner committed at least three crimes against a person. When guilt or innocence is at issue, the Sixth Amendment gives the jury the final say. Whether the trial court agreed with the jury's decision or not, it was bound by the verdict. The Michigan Court of Appeals erred when it condoned the use of judicial fact-finding to increase Petitioner's sentencing guidelines score past the intermediate sanction threshold.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

CHRISTOPHER J. MCGRATH
Counsel of Record
42705 Grand River Avenue
Suite 201
Novi, Michigan 48375-1727
(248) 374-1822

APPENDIX A

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,	UNPUBLISHED May 22, 2007
Plaintiff-Appellee,	No. 269425 Oakland Circuit Court
v	
JEFFREY THOMAS KITTKA,	LC No. 2005-201838-FH
Defendant-Appellant.	

Before: Cooper, P.J., and Murphy and Neff, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of one count of criminal sexual conduct in the second degree (CSC II), the victim being under 13 years of age, MCL 750.520c(1)(a). The trial court sentenced defendant to 18 months to 15 years in prison. Defendant appeals as of right. We affirm. This case is being decided without oral argument in accordance with MCR 7.214(E).

Complainant, defendant's niece, eight years old at the time, testified that she spent several nights at defendant's house, and that on the last such occasion she went to sleep on the floor in the basement, then awoke when defendant "put his hands somewhere he shouldn't have," clarifying that by that she meant her "[p]rivate," which she used to "[g]o to the bathroom." Complainant elaborated that defendant unbuttoned

her pajamas, and touched her "private parts" under her underwear with his fingers moving "[k]ind of everywhere," until she pushed his hand away. Complainant added that defendant had touched her in this manner on at least one earlier occasion.

When interviewed by a police officer about the allegations against him, defendant protested that he knew nothing of any inappropriate touching, but raised the possibility that such a thing might have occurred while he was asleep.

Defendant was charged with two counts of CSC II. The jury convicted him of one count, but acquitted him of the other count.

On appeal, defendant challenges his minimum sentence on the ground that the trial court erred in scoring one of the offense variables, and argues that the trial court erred in failing to provide his jury with an instruction on the defense of accident. However, defendant admits that neither issue was preserved by a proper objection below.

"If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence." MCL 769.34(10). However, a criminal appellant may not challenge the scoring of the sentencing guidelines or the accuracy of the information used in imposing a sentence within the guidelines range unless the issue

was raised at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed with this Court. *Id.*; MCR 6.429(C); *People v Harmon,* 248 Mich App 522, 530; 640 NW2d 314 (2001). Defendant's failure to preserve his sentencing issue is fatal to it.[1] It is without merit in any event.

Defendant asserts as a scoring error that the trial court assessed 25 points for offense variable 13, which is the proper score where "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(b). Defendant's presentence investigation report (PSIR) indicates that complainant reported that defendant's assaultive behavior took place each time she spent the night at his house. A scoring decision will not be reversed if any evidence exists to support the score. *People v Hornsby,* 251 Mich App 462, 468; 650 NW2d 700 (2002).

However, defendant points out that he was acquitted of one count of CSC II, and argues that the trial court was not entitled to assess points on the basis of its own conclusion that defendant committed more acts of CSC than what the jury determined beyond a reasonable doubt. Defendant relies on *Blakely v Washington,* 542 US 296; 124 S Ct 2531;

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[1] Defendant moved this Court to remand this case to the trial court for resentencing, for the reasons raised on appeal, but failed to do so in timely fashion. See MCR 7.211(C)(1)(a). Accordingly, defendant's post-sentencing motion did not preserve this issue.

159 L Ed 2d 403 (2004), where the United States Supreme Court held that "every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment." *Id.* at 313 (emphasis in the original). But our Supreme Court has reiterated that "'the Michigan system is unaffected by the holding in *Blakely*. . . .'" *People v Drohan,* 475 Mich 140, 164; 715 NW2d 778 (2006), quoting *People v Claypool,* 470 Mich 715, 730 n 14; 684 NW2d 278 (2004). The Court elaborated, "a defendant does not have the right to anything less than the maximum sentence authorized by the . . . verdict, and, therefore, judges may make certain factual findings to select a specific minimum sentence from within a defined range." *Drohan, supra* at 159. Defendant's recourse to *Blakely, supra,* is thus unavailing. The sentencing court was and remains entitled to take into account all the facts of and circumstances of the crime, as determined by the court from various sources, including the PSIR. See *People v Potrafka,* 140 Mich App 749, 751-752; 366 NW2d 35 (1985). Further, as defendant acknowledges, MCL 777.43(2)(a) specifies that "all crimes within a 5-year period, including the sentencing offense, shall be counted *regardless of whether the offense resulted in a conviction.*" (Emphasis added).

Moreover, because the recommended range for defendant's minimum sentence, as agreed by the parties, was 12 to 24 months, the trial court's decision to eschew an intermediate sanction in favor of a minimum term of imprisonment of 18 months constituted no

departure for purposes of bringing *Blakely, supra,* to bear. MCL 769.34(4)(a); *People v Uphaus,* ___ Mich App ___; ___ NW2d ___ (Docket No. 267238, pub'd April 3, 2007, at 9:10 a.m.), slip op at 1-2, 6.

For these reasons, we reject defendant's unpreserved sentencing challenge.

Defendant argues that the trial court should have instructed the jury on the defense of accident, in light of defendant's suggestion that any unwelcome touching of complainant may have occurred while defendant was asleep. We disagree. A defendant pressing an unpreserved claim of error must show a plain error that affected substantial rights. The reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *People v Carines,* 460 Mich 750, 763; 597 NW2d 130 (1999).

Jury instructions should cover each element of each offense charged, along with all material issues, defenses, and theories that have evidentiary support. *People v Daniel,* 207 Mich App 47, 53; 523 NW2d 830 (1994). In this case, the trial court did instruct the jury that to find defendant guilty of criminal sexual conduct it had to conclude that his actions were "for sexual purposes or could reasonably be construed as having been done for sexual purposes." We conclude that this well enough covered defendant's alternative accident theory. Moreover, we observe that defense counsel answered in the negative when asked if he

wished for any additions or corrections to the instructions, and expressly declined to object when asked to respond to the trial court's answer when the jury asked if a person is responsible for his actions while sleeping. Counsel's expressed acquiescence to the instructions as given waives appellate error. See *People v Carter,* 462 Mich 206, 214-216; 612 NW2d 144 (2000).

For these reasons, we must reject defendant's instructional challenge.

Affirmed.

/s/ Jessica R. Cooper
/s/ William B. Murphy
/s/ Janet T. Neff

APPENDIX B

STATE OF MICHIGAN

IN THE CIRCUIT COURT
FOR THE COUNTY OF OAKLAND

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff,

V

JEFFREY THOMAS KITTKA,
Defendant, /

CR #-2005-201838-FH
HONORABLE GENE SCHNELZ

VERDICT FORM

You may return only one verdict on each count. Mark only one box for each count on this sheet.

Count One: Second Degree Criminal Sexual Conduct (Person under Thirteen)

☐ Not Guilty

☒ Guilty as Charged

Count Two: Second Degree Criminal Sexual Conduct (Person Under Thirteen)

☒ Not Guilty

☐ Guilty as Charged

2-1-06 /s/ Kari Mihallik
Date Foreperson

APPENDIX C

STATE OF MICHIGAN 6TH JUDICIAL CIRCUIT OAKLAND COUNTY	JUDGMENT OF SENTENCE COMMITMENT TO CORRECTIONS DEPARTMENT
ORI: MI-630015J	COURT ADDRESS: 1200 N. TELEGRAPH RD.
THE PEOPLE OF THE STATE OF MICHIGAN V	KITTKA, JEFFREY, THOMAS, 46280 10 MILE RD NOVI MI 48375 (248) 347-6941 CTN 63-05-003891-01 SID 2503826M DOB xx-xx-xxxx
PROSECUTING ATTORNEY NAME DAVID G. GORCYCA	/ BAR NO P41352
DEFENDANT ATTORNEY NAME LAWRENCE G., KALUZNY,	/ BAR NO P15663

THE COURT FINDS:

THE DEFENDANT PLEAD/FOUND GUILTY ON 02/01/2006 OF THE CRIME(S) STATED BELOW:

CNT	CONVICTED BY PLEA	CONVICTED BY COURT	CONVICTED BY JURY	CRIME	CHARGE CODE(S) MCL CITATION/ PACC CODE
001			NG	2ND DEG CSC (U/13)	750.520C1A
002			G	2ND DEG CSC (U/13)	750.520C1A

IT IS ORDERED:

PARTICIPATING IN A SPECIAL ALTERNATIVE INCARCERATION UNIT IS PROHIBITED. DEFENDANT IS SENTENCED TO THE CUSTODY OF THE MICHIGAN DEPARTMENT OF CORRECTIONS. THIS SENTENCE SHALL BE EXECUTED IMMEDIATELY.

CNT	SENTENCE DATE	MINIMUM YRS	MINIMUM MOS	DAYS
001	03/02/2006			
002	03/02/2006		18	

MAXIMUM YRS	MAXIMUM MOS	SENTENCE BEGINS	JAIL MOS	CR DAYS	OTHER INFO
		03/02/2006			
15		03/02/2006		21	

DEFENDANT SHALL PAY $60.00 ASSESSMENT FOR THE CRIME VICTIM RIGHTS FUND.

DEFENDANT SHALL PAY $60.00 FOR STATE MINIMUM COSTS.

FINES, COSTS, AND FEES NOT PAID WITHIN 56 DAYS OF THE DATE OWED ARE SUBJECT TO A 20% LATE PENALTY ON THE AMOUNT OWED.

OTHER: COMPLY WITH DNA TEST/NO CONTACVT [sic] WITH VICTIM, xxxxx xxxxx\HIV TEST\SHALL COMPLY WITH SEX OFFENDER REGISTRATION REQUIREMENTS NO CONTACT WITH VICTIMS.

DATE: 03/02/2006 /s/ Gene Schnelz
JUDGE GENE SCHNELZ
P20038

UNDER MCL 769.16A THE COURT CLERK SHALL SEND A COPY OF THIS ORDER TO THE MICH STATE POLICE CENTRAL RECORDS DIV TO CREATE A CRIMINAL HISTORY RECORD.

I CERTIFY THAT THIS IS A CORRECT AND COMPLETE ABSTRACT FROM THE ORIGINAL COURT RECORDS. THE SHERIFF SHALL, WITHOUT NEEDLESS DELAY, DELIVER DEFENDANT TO THE MICH DEPT OF CORRECTIONS AT A PLACE DESIGNATED BY THE DEPARTMENT.

(SEAL) /s/ D. Major
DEPUTY COURT CLERK

CC 219B JUDGMENT OF SENTENCE, COMMITMENT TO CORRECTIONS DEPARTMENT NOVI POLICE DEPT.

APPENDIX D

Court of Appeals, State of Michigan

ORDER

People of MI v Jeffrey Thomas Kittka Docket No. 269425 LC No. 2005-201838-FH	Pat M. Donofrio Presiding Judge Henry William Saad Deborah A. Servitto Judges

The Court orders that the motion to remand is DENIED because defendant-appellant has failed to demonstrate that the issue should be decided initially by the trial court. MCR 7.211(C)(1)(a)(i).

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

(SEAL) Oct. 27, 2006 /s/ Sandra Schultz Mengel
Date Chief Clerk

APPENDIX E

Order

September 24, 2007
134441 & (40)

Michigan Supreme Court
Lansing, Michigan
Clifford W. Taylor,
Chief Justice
Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman,
Justices

PEOPLE OF THE
STATE OF MICHIGAN

Plaintiff-Appellee,

v

JEFFREY THOMAS KITTKA,

Defendant-Appellant.

SC: 134441
COA: 269425
Oakland CC:
2005-201838-FH

On order of the Court, the motion for immediate consideration is GRANTED. The application for leave to appeal the May 22, 2007 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

(SEAL)

September 24, 2007 /s/ Corbin R. Davis
Clerk

APPENDIX F

769.34 Sentencing guidelines; application; minimum sentence; departure from sentencing range; intermediate sanctions; mandatory penalty; fines, costs, or assessments; appeal; review; time served

Sec. 34. (1) The sentencing guidelines promulgated by order of the Michigan supreme court do not apply to felonies enumerated in part 2 of chapter XVII[1] committed on or after January 1, 1999.

(2) Except as otherwise provided in this subsection or for a departure from the appropriate minimum sentence range provided for under subsection (3), the minimum sentence imposed by a court of this state for a felony enumerated in part 2 of chapter XVII committed on or after January 1, 1999 shall be within the appropriate sentence range under the version of those sentencing guidelines in effect on the date the crime was committed. Both of the following apply to minimum sentences under this subsection:

(a) If a statute mandates a minimum sentence for an individual sentenced to the jurisdiction of the department of corrections, the court shall impose sentence in accordance with that statute. Imposing a mandatory minimum sentence is not a departure under this section. If a statute mandates a minimum sentence for an individual sentenced to the jurisdiction of the

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[1] M.C.L.A. § 777.11 et seq.

department of corrections and the statute authorizes the sentencing judge to depart from that minimum sentence, imposing a sentence that exceeds the recommended sentence range but is less than the mandatory minimum sentence is not a departure under this section. If the Michigan vehicle code, 1949 PA 300, MCL 257.1 to 257.923, mandates a minimum sentence for an individual sentenced to the jurisdiction of the department of corrections and the Michigan vehicle code, 1949 PA 300, MCL 257.1 to 257.923, authorizes the sentencing judge to impose a sentence that is less than that minimum sentence, imposing a sentence that exceeds the recommended sentence range but is less than the mandatory minimum sentence is not a departure under this section.

(b) The court shall not impose a minimum sentence, including a departure, that exceeds 2/3 of the statutory maximum sentence.

(3) A court may depart from the appropriate sentence range established under the sentencing guidelines set forth in chapter XVII[2] if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure. All of the following apply to a departure:

(a) The court shall not use an individual's gender, race, ethnicity, alienage, national origin, legal occupation, lack of employment, representation by

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[2] M.C.L.A. § 777.1 et seq.

appointed legal counsel, representation by retained legal counsel, appearance in propria persona, or religion to depart from the appropriate sentence range.

(b) The court shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight.

(4) Intermediate sanctions shall be imposed under this chapter as follows:

(a) If the upper limit of the recommended minimum sentence range for a defendant determined under the sentencing guidelines set forth in chapter XVII is 18 months or less, the court shall impose an intermediate sanction unless the court states on the record a substantial and compelling reason to sentence the individual to the jurisdiction of the department of corrections. An intermediate sanction may include a jail term that does not exceed the upper limit of the recommended minimum sentence range or 12 months, whichever is less.

(b) If an attempt to commit a felony designated in offense class H in part 2 of chapter XVII is punishable by imprisonment for more than 1 year, the court shall impose an intermediate sanction upon conviction of that offense absent a departure.

(c) If the upper limit of the recommended minimum sentence exceeds 18 months and the lower limit of the recommended minimum sentence is 12 months or less, the court shall sentence the offender as follows absent a departure:

(*i*) To imprisonment with a minimum term within that range.

(*ii*) To an intermediate sanction that may include a term of imprisonment of not more than 12 months.

(5) If a crime has a mandatory determinant penalty or a mandatory penalty of life imprisonment, the court shall impose that penalty. This section does not apply to sentencing for that crime.

(6) As part of the sentence, the court may also order the defendant to pay any combination of a fine, costs, or applicable assessments. The court shall order payment of restitution as provided by law.

(7) If the trial court imposes on a defendant a minimum sentence that is longer or more severe than the appropriate sentence range, as part of the court's advice of the defendant's rights concerning appeal, the court shall advise the defendant orally and in writing that he or she may appeal the sentence as provided by law on grounds that it is longer or more severe than the appropriate sentence range.

(8) All of the following shall be part of the record filed for an appeal of sentence under this section:

(a) An entire record of the sentencing proceedings.

(b) The presentence investigation report. Any portion of the presentence investigation report exempt from disclosure by law shall not be a public record.

(c) Any other reports or documents the sentencing court used in imposing sentence.

(9) An appeal of a sentence under this section does not stay execution of the sentence.

(10) If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence. A party shall not raise on appeal an issue challenging the scoring of the sentencing guidelines or challenging the accuracy of information relied upon in determining a sentence that is within the appropriate guidelines sentence range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals.

(11) If, upon a review of the record, the court of appeals finds the trial court did not have a substantial and compelling reason for departing from the appropriate sentence range, the court shall remand

the matter to the sentencing judge or another trial court judge for resentencing under this chapter.

(12) Time served on the sentence appealed under this section is considered time served on any sentence imposed after remand.

P.A.1927, No. 175, c. IX, § 34, added by P.A. 1994, No. 445, § 1. Amended by P.A. 1998, No. 317, Eff. Dec. 15, 1998; P.A. 1999, No. 227, Imd. Eff. Dec. 28, 1999; P.A. 2000, No. 279, Eff. Oct. 1, 2000; P.A. 2002, No. 666, Eff. March 1, 2003.